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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 505

COMMISSIONER OF INTERNAL REVENUE

v.

GEORGE W. ELKINS

BRIEF SUBMITTED BY MITCHELL B. CARROLL AND L. PAUL BRYANT, JR., *AMICI CURIAE.*

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COMMISSIONER OF INTERNAL REVENUE *vs.* GEORGE W. ELKINS.	No. 505.

BRIEF OF *AMICUS CURIAE.*

Introductory Statement.

This brief *amicus curiae* is filed pursuant to the consent of counsel in the case at bar.

Our interest in the case arises from the fact that we represent a number of American taxpayers who are engaged in international business and hold substantial investments in the stocks of foreign corporations. Such investments have in large part been made in reliance upon the long-established practice of the Bureau of Internal Revenue (fifteen years) which has allowed claims for credit against American income tax for taxes paid to the British Government upon dividends distributed by British corporations. It is felt that this practice should be sustained conformably to the ruling in the case at bar as otherwise serious prejudice may result to the interests of a large number of American taxpayers who have relied thereon.

ARGUMENT.

1. The British income tax law envisaged the respondent as the taxpayer and respondent paid such tax through suffering it to be deducted from dividends paid to him. Failure to permit such deduction would have subjected respondent to penalties provided for by that law.

The primary purpose of this brief is to emphasize the fact that the United Kingdom standard rate of income tax which was claimed as a credit against the respondent's federal income tax for 1931, under section 131(a)(b) of the Revenue Act of 1928 (45 Stat. 791) 26 U. S. C. A., Section 131, was a tax paid by the respondent and therefore within the purview of the above-mentioned provision.

Briefly, section 131(a) provides, subject to the limitation in subsection (b), that the tax imposed by Title I of the 1928 act shall be credited with, "in the case of a citizen of the United States and of a domestic corporation, the amount of any income, war-profits, and excess-profits taxes paid or accrued during the taxable year to any foreign country or to any possession of the United States."

Obviously, in enacting the credit provision the Congress intended to give the citizen relief from international double taxation in respect of income tax paid to a foreign country. The provision for relief had first been introduced in the Revenue Act of 1918 in order to help restore American commerce with foreign countries after the war of 1914 through relieving him of the paralyzing burden of having to pay taxes both in the country of source of the income

from trade and investments and again in the United States, at rates which together often totaled more than the income involved. (See House Report 767, 65th Congress, 2nd session, Revenue Bill of 1918, 7308, Vol. 2, p. 11.) Through this unilateral measure, the United States accomplishes what numerous other countries accomplish by exemptions or allowances in their tax laws or in more than forty bilateral conventions.*

Knowing that the forms of taxes differ so greatly from country to country, the Congress said that the credit should apply to *any* income taxes. It obviously meant that the relief should be granted whenever the United States citizen paid *any* income tax to *any* foreign country, whether by direct assessment, or by deduction or withholding at source, which is a common method of collection in many foreign countries, and is the basic method in the United Kingdom.

The principle of collection at source has been followed to the fullest extent possible in the United Kingdom income tax for about a hundred years. This is done although the tax itself is considered a personal tax on the taxpayer. It consists of a standard rate which is withheld wherever possible at source on rents, dividends, annual interest and other annual payments, and a progressive surtax based on the principle of capacity to pay. In the ordinary case of a resident in the United Kingdom, when the amount of tax withheld at source exceeds the standard rate assessed on the net income of the taxpayer on the basis of his return, the taxpayer can claim a refund of the excess paid. (Income Tax Act, 1918, 8 & 9 George V, Chapter 40, Part III.) Even

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* Collection of International Agreements and Internal Legal Provisions for the Prevention of Double Taxation and Fiscal Evasion, League of Nations.

if the overtaxed income consists wholly or in part of dividends, the refund is made to the shareholder and not to the company.

Where rents or interest are paid by one individual to another, the collection at the source is easy to define, but where the debtor is a company ("body of persons"), the British Parliament found it necessary to lay down special provisions. Despite the fact that it was a separate legal person, the company was looked upon for income tax purposes as being in effect a conduit of income which would facilitate collecting taxes. Although it pays the standard rate on its statutory income, when dividends are distributed the company is authorized to deduct the tax appropriate thereto (Rule 20) and if a shareholder refuses to allow a deduction of the authorized tax, he shall be subject to a fine (Rule 23).

General Rules 20 and 23 of the British Income Tax Act of 1918 are quoted below:

> Rule 20. "The profits or gains to be charged on any body of persons shall be computed in accordance with the provisions of this Act on the full amount of the same before any dividend thereof is made in respect of any share, right or title thereto, and *the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto.*"
>
> Rule 23. "(1) *A person who refuses to allow a deduction of tax authorized by this Act* to be made out of any payment, *shall forfeit the sum of fifty pounds.*
>
> (2) Every agreement for payment of interest, rent, or other annual payment in full without allowing any such deduction shall be void." (Italics supplied.)

Thus the British income tax act, through the foregoing provisions for withholding the tax and levying a penalty, actually imposes the tax upon the shareholder. The essential fact is that the statute itself compels the shareholder to pay the tax. The incidence of the tax is specifically placed upon him.

As was stated by the Circuit Court of Appeals for the Third Circuit in the case here under review (*Elkins* v. *Commissioner*):

> "The language of the taxing statutes would indicate that it is the shareholder who pays the tax through this process of withholding or deduction. The wording is always if a person 'has paid any tax, by deduction or otherwise,' or 'has been charged with tax by deduction or otherwise.' See Income Tax 1918, Part III, Section 29 (1), Part IV, Section 55 (1), Part X, Section 211 (1). See General Rules Income Tax, 1918, Sections 20, 23. See Finance Act, 1920, Section 27 (1)."

Such expressions afford cumulative evidence of the fact that the shareholder is unquestionably regarded under British law as the taxpayer. This clearly shows that, contrary to the statement of the United States Circuit Court of Appeals for the Second Circuit in Biddle *v.* Commissioner, the taxpayer does owe a "direct responsibility or liability to the government", and this is further evinced by the fact that the British company is required, subject to penalties, to show on the dividend warrant not only the net amount paid, but also the corresponding gross amount, and the rate and amount of income tax appropriate to that gross amount, (Section 33, Finance Act of 1924). Furthermore, the shareholder was required to include the gross

amount of the dividend in the computation of the British surtax, for which a credit against the United States tax was granted.

The existence of Rule 20, which specifically authorizes withholding of tax from the shareholder, makes inapplicable the argument of the Court of the Second Circuit, in Biddle *v.* Commissioner, which is derived from a comparison of the British income tax with an excise tax* in the case of Shearer *v.* Commissioner, 48 Fed. (2d) 552. Apart from the dissimilarity of the two types of taxes considered, and the fact that the one case involved the deduction of an excise tax in computing net income and the other the crediting of one income tax against another, in the Shearer case the statutory liability for the excise tax had been construed to be upon the dealer and the tax was not specifically authorized to be added to the price paid by the purchaser. On the contrary, in this case the United Kingdom income tax act definitely authorized the deduction of the income tax from the dividend distributed to the shareholder and imposed a penalty if he refused to permit such deduction. The taxpayer in the present case was, as required by law, expressly notified on the dividend warrant that the tax had been deducted at source from the dividends paid to him, and the statutory incidence of the tax filed fell directly on the shareholder.

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* It is doubtful whether exise taxes can be taken as a criterion because, for example, the federal government has ruled that some twelve state gasoline excise taxes fall on the dealer whereas some thirty-five fall on the consumer, the question being one of statutory construction in each case. The various Treasury decisions containing these rulings are summarized in the 1937 Commerce Clearing House Federal Tax Service at ¶181,401, and in 1937 Prentice-Hall Federal Tax Service at ¶13,109.

2. The foreign tax credit should be construed to fulfill its purpose.

Even if any doubt could remain as to the right of the taxpayer to the credit for the British tax, this Honorable Court should take cognizance of the broad significance of the phrase "any income, war-profits, and excess-profits taxes" and the purpose of the relief, and should construe the phrase so as to effectuate that purpose. (See Burnet *v.* Chicago Portrait Co., 285 U. S. 1, 52 S. Ct. 275; United States *v.* Updike, 281 U. S. 489; Dauphin Trust Co. *v.* United States, 80 F. (2d) 893, 896; Commissioner *v.* Bryson, 79 F. (2d) 397, 402.)

In holding these shares, the taxpayer was relying on legislative provisions in effect since 1918 as well as contemporaneous rulings and practices of the Bureau of Internal Revenue. (See S. M. 3040, C. B. IV-1, p. 198; S. M. 5363, C. B. V-1, p. 89; I. T. 2401, C. B. VII-1, p. 126.) To reverse this long-established rule because of a misconception of the British law will not only cause great hardship to the taxpayer in the present case, but also to many others who would be subjected to deficiency assessments and increased taxes.

If United States citizens and corporations who have acquired shares in British companies in reliance upon the rulings of the Bureau are thus seriously prejudiced, it may jeopardize the general application of the provision for relief from international double taxation and may result in impairment of our foreign trade.

It is therefore urged that the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of George W. Elkins *v.* Commissioner of Internal Revenue be affirmed by this Honorable Court.

Respectfully submitted,

MITCHELL B. CARROLL,
L. PAUL BRYANT, JR.,
Amici Curiae.

SUPREME COURT OF THE UNITED STATES.

Nos. 55 and 505.—October Term, 1937.

Mary Duke Biddle, Petitioner, 55 *vs.* Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.
Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, 505 *vs.* George W. Elkins.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[January 10, 1938.]

Mr. Justice Stone delivered the opinion of the Court.

In their British income tax returns, stockholders in British corporations are required to report as income, in addition to the amount of dividends actually received, amounts which reflect their respective proportions of the tax paid by the corporation on its own profits. The principal question raised by these petitions is whether these amounts constitute "income . . . taxes paid or accrued during the taxable year to [a] foreign country" so as to entitle the stockholders, if they are citizens of the United States, to credits of those amounts upon their United States income tax, by virtue of § 131 (a) (1) of the Revenue Act of 1928. A further question is whether any of the amounts not so available as a credit may be deducted from gross income under § 23 (c) (2) of the Act for the purpose of ascertaining the net income subject to tax.

Petitioner in No. 55 and respondent in No. 505, hereafter called the taxpayers, received cash dividends during the taxable years 1929 and 1931, respectively, on their stock in three British corporations. Each of the corporations having itself paid or become liable to pay the British tax on the profits thus distributed, no further exaction at the "standard" (normal) rate was due the British government on account of the distribution from either the stock-

holders of the corporation.[1] Only in the case of individuals whose income exceeds a stated amount is a surtax levied. In these circumstances the corporations are directed to certify to shareholders, at the time of sending out warrants for the dividends, the gross amount from which the income tax "appropriate thereto" is deducted, the rate and amount of the income tax appropriate to the gross amount, and the net amount actually paid.[2]

The tax "appropriate" to the dividend is computed by applying the standard rate for the year of distribution, to the value of the money or other property distributed.[3] The amount so computed will equal the tax paid at the standard rate by the corporation on its profits if, but only if, the tax rate is the same in the year when the profits are earned as in the year when they are distributed.

One of the companies availed itself of the statutory permission[4] to declare a gross dividend, from which it deducted the tax before actual distribution, certifying to the taxpayers that the dividend would be paid "less" income tax. The other two companies declared the dividend in the amount distributed to stockholders and certified that it was "free of tax." The certificates of the latter did not purport to show any deduction of tax from a gross dividend, but did indicate the amount of the tax appropriate to the dividend and showed the same net return to stockholders as if the tax had been deducted from a computed gross dividend.

In their returns transmitted to the Department of Inland Revenue of the British government, the taxpayers reported as income subject to surtax the amount of income taxes appropriate to their dividends, in addition to the money actually received, and paid surtaxes on that total sum. In their United States income tax re-

[1] British Income Tax Act 1918, 8 and 9 Geo. V, c. 40, as amended by § 38, Finance Act of 1927, 17 and 18 Geo. V, c. 10. General Rule 1 of the 1918 Act provides, "Every body of persons shall be chargeable to tax in like manner as any person is chargeable under the provisions of this Act." By § 237 of the 1918 Act "body of persons" includes "any company . . . whether corporate or not corporate."

[2] Section 33, Finance Act of 1924, 14 and 15 Geo. V, c. 21.

[3] The Act of 1918 prescribes general rules for the assessment and collection of taxes "on profits from property, trade or business". By General Rule 20 it is provided that the tax is to be paid on the "full amount" of the profit "before any dividend thereof is made in respect of any share . . . and the body of persons paying such dividend shall be entitled to deduct the tax appropriate thereto." The tax "appropriate" to a dividend payment is the standard rate of tax for the year in which the dividend is declared, regardless of the rate at which the amount distributed was in fact taxed when it was received by the company. Hamilton *v.* Commissioners of Inland Revenue, 16 British Tax Cases, 213, 229, 234; Neumann *v.* Commissioners of Inland Revenue, 18 British Tax Cases, 332, 359, 361.

[4] General Rule 20, Income Tax of 1918.

turns for those years, the taxpayers included in gross income the entire sums so reported in the British returns. Up to the limit set by § 131 (b), they claimed as credits against the tax payable to the United States the amount of British tax appropriate to the dividends as well as the amount of surtax paid. A deduction from gross income was claimed under § 23 (c) (2) for the amount by which the limit was exceeded.

Deficiency assessments of the taxpayers were brought to the Board of Tax Appeals for review. There the issues were narrowed to the questions now before us, whether the taxpayers, after adding to gross income the amounts included in the British returns as taxes appropriate to the dividends received, were then entitled to deduct those amounts from the tax as computed, to the extent permitted by § 131 (b), and whether the excess was a permissible deduction from gross income.

The board held that the sums in dispute should not have been included in gross income, because they represented neither property received by the taxpayers nor the discharge of any taxes owed by them to the British government. It held further that § 131 (a) (1) of the Revenue Act of 1928, which directs that the income tax be credited with "the amount of any income . . . taxes paid or accrued during the taxable year to any foreign country . . ." is inapplicable because the United Kingdom fails to tax dividends at the normal rate, and hence the taxes appropriate to dividends were paid by the corporations rather than the taxpayer stockholders.

In No. 55 the Court of Appeals for the Second Circuit affirmed the determination of the board, 86 F. (2d) 718, since followed by that circuit in *F. W. Woolworth Co.* v. *United States,* 91 F. (2d) 973, and the Court of Appeals for the Third Circuit, in No. 505, reversed, 91 F. (2d) 534, following a decision of the Court of Appeals for the First Circuit in *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363. We granted certiorari, — U. S. —, to resolve this conflict of decision, and because of the importance of the question in the administration of the revenue laws.

At the outset it is to be observed that decision must turn on the precise meaning of the words in the statute which grants to the citizen taxpayer a credit for foreign "income taxes paid." The power to tax and to grant the credit resides in Congress, and it is the will of Congress which controls the application of the provisions for credit. The expression of its will in legislation must be

taken to conform to its own criteria unless the statute, by express language or necessary implication, makes the meaning of the phrase "paid or accrued", and hence the operation of the statute in which it occurs, depend upon its characterization by the foreign statutes and by decisions under them. Cf. *Crew Levick Co.* v. *Pennsylvania,* 245 U. S. 292, 294; *Weiss* v. *Weiner,* 279 U. S. 333, 337; *Burnet* v. *Harmel,* 287 U. S. 103, 110.

Section 131 does not say that the meaning of its words is to be determined by foreign taxing statutes and decisions, and there is nothing in its language to suggest that in allowing the credit for foreign tax payments, a shifting standard was adopted by reference to foreign characterizations and classifications of tax legislation. The phrase "income taxes paid", as used in our own revenue laws, has for most practical purposes a well understood meaning to be derived from an examination of the statutes which provide for the laying and collection of income taxes. It is that meaning which must be attributed to it as used in § 131.

Hence the board's finding, supported as it is by much expert testimony, that "the stockholder receiving the dividend is regarded in the English income tax acts as having paid 'by deduction or otherwise' the tax 'appropriate' to the dividend" is not conclusive. At most it is but a factor to be considered in deciding whether the stockholder pays the tax within the meaning of our own statute. That must ultimately be determined by ascertaining from an examination of the manner in which the British tax is laid and collected what the stockholder has done in conformity to British law and whether it is the substantial equivalent of payment of the tax as those terms are used in our own statute.

We are here concerned only with the "standard" or normal tax. The scheme of the British legislation is to impose on corporate earnings only one standard tax, at the source, and to avoid the "double" taxation of the corporate income as it passes to the hands of its stockholders, except as they are subject to surtax which the corporation does not pay. The corporation pays the standard tax and against it the remedies for non-payment run. It has been intimated that the shareholder may be held to payment of the tax in the event of the corporation's default, *Hamilton* v. *Commissioners of Inland Revenue,* 16 British Tax Cases, 213, 236, but the contrary view finds more support in judicial opinion, *id.* at 230; *Dalgety & Co., Ltd.* v. *Commissioners of Inland Revenue,* 15 Brit-

ish Tax Cases, 216, 238; *Neumann* v. *Commissioners of Inland Revenue*, 18 British Tax Cases, 341, 345, 358, 362-363, 368, and was adopted by the taxpayers' expert.

Although the corporation, in the United Kingdom as here, pays the tax and is bound to pay it, the tax burden in point of substance is passed on to the stockholders in the same way that it is passed on under our own taxing acts where the tax on the corporate income is charged as an expense before any part of the resulting net profit is distributed to stockholders. See Magill, Taxable Income, 24 *et seq.* Whether the tax is deducted from gross profits before a dividend is declared, or after, when the deduction is taken from the gross dividend, the net amount received by the stockholder is the same. Under either system, if no dividend is declared no tax is paid by the stockholder.[5] If a dividend is declared it must be paid, however the deduction is made, from what is left after the corporation has paid taxes upon its earnings. The differences in the two methods of deduction are to be found only in the formal bookkeeping data which, in the British system, are communicated to the stockholders, not for the purpose of laying or collecting the tax which the corporation has already paid or must pay, but to aid the stockholders in computing their surtax and in securing the benefit of any refund of the tax.

The stockholders' surtax is computed upon the gross dividend, the dividend which he actually receives plus the tax deducted.[6] If the stockholder's income is exempt or less than the minimum amount subject to the tax, refund is made to him of the proportionate share of the tax paid by the corporation.[7] It is upon these features of the British system that the taxpayers chiefly rely to support their argument that the stockholder pays the tax. For these limited purposes, which do not affect the assessment and payment of the tax, it is true that the British acts treat the stockholder as though he were the taxpayer. But with respect to the surtax the stockholder pays it and the taxpayers here have received for its payment the credit which our statute allows. Inclusion of the deducted

[5] Cf. Dalgety & Co., Ltd. *v.* Commissioners of Inland Revenue, 15 British Tax Cases 216, 238; Neumann *v.* Commissioners of Inland Revenue, 18 British Tax Cases 341, 345, 358, 362-363, 368.

[6] Hamilton *v.* Commissioners of Inland Revenue, 16 British Tax Cases 213, 229, 234; Neumann *v.* Commissioners of Inland Revenue, 18 British Tax Cases 332, 345, 358-360, 361.

[7] Income Tax Act of 1918, §§ 29 (1), 55 (1), 211 (1) as amended by Finance Act, 1920, § 27 (1).

amount in the base on which surtax is calculated, together with the provisions for refund of the tax to the stockholder who, in any event, bears its economic burden, are logical recognitions of the British conception that the standard tax paid by the corporation is passed on to the stockholders.

Our revenue laws give no recognition to that conception. Although the tax burden of the corporation is passed on to its stockholders with substantially the same results to them as under the British system, our statutes take no account of that fact in establishing the rights and obligations of taxpayers. Until recently they have not laid a tax, except surtax, on dividends, but they have never treated the stockholder for any purpose as paying the tax collected from the corporation. Nor have they treated as taxpayers those upon whom no legal duty to pay the tax is laid. Measured by these standards our statutes afford no scope for saying that the stockholder of a British corporation pays the tax which is laid upon and collected from the corporation, and no basis for a decision that § 131 extends to such a stockholder a credit for a tax paid by the corporation—a privilege not granted to stockholders in our own corporations. It can hardly be said that a tax paid to the Crown by a British corporation subject to United States income tax is not a tax paid within the meaning of § 23 (c) (2), of the 1928 Act, which allows a deduction from gross income for taxes paid to a foreign country, cf. *Welch* v. *St. Helens Petroleum Co., Ltd.*, 78 F. (2d) 631, or that its stockholders could take credit under § 131 for their share of the tax on the theory that they also had paid it.

The taxpayers urge that departmental rulings sustaining credits or deductions by stockholders of British corporations, S. M. 3040, IV-1 C. B. 198; S. M. 5363, V-1 C. B. 89; I. T. 2401, VII-1 C. B. 126; G. C. M. 3179, VII-1 C. B. 240, have taken on the force of law by virtue of the reenactment of the deduction and credit provisions carried into §§ 23 and 131 of the 1928 Act. Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U. S. 455, 467-468, these rulings rest for their conclusions as to the application of § 131 upon their interpretation of the nature and effect of the British legislation. The presumption that Congress, in reenacting a statute, can ascertain the course of administrative interpretation and, knowing its own intent, will correct the administrative ruling if mistaken, cannot

apply to rulings upon the intent of other legislative bodies. So far as the rulings with which we are now concerned sought to state the force and effect of British law they can have no more binding effect on courts than in the case of any determination of fact which calls into operation the taxing statutes. So far as they have construed our own statute as adopting the British characterization, they plainly misinterpret an unambiguous provision. Where the law is plain the subsequent reenactment of a statute does not constitute adoption of its administrative construction. *Iselin* v. *United States,* 270 U. S. 245; *Louisville & N. R. Co.* v. *United States,* 282 U. S. 740; *Helvering* v. *New York Trust Co., supra.*

What we have said is decisive of the second question, whether any of the amounts not available for credit under § 131 may be deducted from gross income for the purpose of arriving at taxable net income. By § 23 (c) (2) of the 1928 Act the deductions of "income . . . taxes imposed by the authority of any foreign country" are limited to taxes paid or accrued. Since we have held that the taxpayer has not paid or become subject to the foreign tax here in question, the section by its terms is inapplicable.

No. 55 is affirmed.

No. 505 is reversed.

Mr. Justice McREYNOLDS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER are of opinion that the applicable rule was correctly stated by the lower court in No. 505, *Elkins* v. *Commissioner,* 91 F. (2d) 534, and by the Circuit Court of Appeals for the First Circuit in *United Shoe Machinery Corp.* v. *White,* 89 F. (2d) 363, and that the challenged judgment in No. 55 should be reversed and that in No. 505 affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.